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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re NARVIS GENE NONETTE,

on Habeas Corpus.

E063456

(Super.Ct.No.FVI1302571)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Dwight W. Moore, Judge. The petition is granted.

Patricia M. Ihara, under appointment by the Court of Appeal, for Petitioner and Defendant.

Kamala D. Harris, Attorney General and Kimberley A. Donohue, Deputy Attorney General, for Respondent.

INTRODUCTION

Petitioner was sentenced to 16 months after pleading no contest to attempted failure to register as a sex offender and admitting a prior strike conviction. Petitioner argues, the People concede, and this court agrees that attempting to fail to register is a

logical impossibility and not a crime, and so the trial court was without fundamental jurisdiction to accept his plea and sentence him. The matter is remanded to the trial court to allow petitioner to withdraw his guilty plea.

FACTS AND PROCEDURE

Defendant was required to register as a sex offender after a 1987 conviction. The San Bernardino County Sheriff's Department crime report succinctly describes the circumstances of the current crime: "Nonnette has been registering as a transient sex offender. He was not found at any of the places he listed as frequenting during compliance checks. On 07/31/2013, Nonnette came to the Victorville City Sheriff's Station to complete a 30-day transient registration. During an interview with Nonnette, he said he was living at a house on Pluto near Bear Valley and would not provide the address, and has been staying at his mother's residence in Temecula and would not provide her address. Nonnette registered as moving to Montclair, but has not registered with the Montclair Police Department or any other law enforcement agency."

On August 4, 2014, the People filed a first amended felony complaint charging defendant in count one with failing to register (Pen. Code, § 290.010)¹ and in count two with failing to advise the prior agency of a move (§ 290.013). The People alleged that defendant had a prior strike conviction (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)).

On August 5, 2014, the complaint was amended by interlineation to add count three— attempted failure to register (§§664, 290.010). On that date defendant pled no

¹ All section references are to the Penal Code unless otherwise indicated.

contest to count three and admitted the prior strike conviction. The court released defendant on a *Cruz*² waiver.

On October 21, 2014, the court sentenced defendant as agreed to the low term of eight months, doubled to sixteen months for the prior strike conviction.

On October 22, 2014, defendant filed a notice of appeal challenging the validity of the plea or admission. His request for probable cause was denied.

On November 4, 2014, defendant filed an amended notice of appeal based on the sentence or other matters not affecting the validity of the plea.

Defendant's appellate counsel filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, which we consider with this petition.

DISCUSSION

The parties agree, as does this court, that attempting to fail to register as a sex offender under sections 664 and 290.010 is not a crime because it is impossible for someone to attempt to fail to do an act.

Both the parties and this court have failed to uncover any California authority directly on point. Petitioner cites an appellate case from Louisiana that clearly sets forth the logic of petitioner's argument: "There is no such crime as an attempt to not register as a sex offender. The crime of failing to register is not a specific intent crime. One

² *People v. Cruz* (1988) 44 Cal.3d 1247.

either fails to register or not. One cannot attempt to not register. One cannot plead guilty to a nonexistent crime.” (*State v. Williams* (2012) 103 So.3d 412, 414.)

Both parties analogize to the reasoning behind California case law on attempted assault, which our courts have found to be a non-crime. “At common law an assault was defined as an attempted battery . . . one cannot attempt to commit an attempt . . . therefore, attempted assault was a deductive impossibility.” (*In re James M.* (1973) 9 Cal.3d 517, 521.) In the same way, attempting to not do something is also a deductive impossibility. One simply cannot attempt to commit an act of omission. This is because an attempt requires a direct ineffectual act done in furtherance of the crime. (*People v. Kipp* (1998) 18 Cal.4th 349, 376. As petitioner rightly argues, attempt requires an act. The crime of failing to register under section 290.010 requires a failure to act. As stated above, one cannot attempt to fail to act. Because the crime to which defendant pled guilty is a logical and practical impossibility, there is no such crime as attempting to fail to register as a sex offender.

Petitioner did not formally raise this issue on appeal because he failed to obtain a certificate of probable cause. However, this issue is reviewable on habeas corpus because, when the trial court accepted petitioner’s guilty plea and later sentenced him for this non-crime, it acted in excess of its fundamental jurisdiction. (*In re Harris* (1993) 5 Cal.4th 813, 838-841.) A court exceeds its fundamental jurisdiction when it sentences an individual for an act that does not constitute a crime. (*People v. Vasilyan* (2009) 174 Cal.App.4th 443, 449-450.)

DISPOSITION

The petition is granted. The matter is remanded to the trial court to allow petitioner to withdraw his guilty plea.

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RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.